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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-451

MORRIS I. COHEN,
Petitioner,

v.

ANCHOR HOCKING GLASS CORPORATION, POWELL & OAKES, INC., and HERMAN GRANT, Regional Attorney for The United States Department of Labor,
Respondents.

RESPONDENT ANCHOR HOCKING GLASS CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

JURISDICTION

Anchor Hocking Glass Corporation agrees that this Court has jurisdiction to determine whether Cohen has presented a basis for granting a writ of certiorari, 28 USC 1254(1).

II.
QUESTIONS PRESENTED

(1) Is Cohen's attempted claim against Powell & Oakes pursuant to a federal question so frivolous that the District Court did not have federal question jurisdiction?

(2) If the District Court did not have federal question jurisdiction over Cohen's asserted claim against Powell & Oakes, did allegations that Powell & Oakes was an agent of Anchor Hocking, create diversity of citizenship jurisdiction, even though admittedly Powell & Oakes was a citizen of the same state as Cohen?

(3) If the asserted claim against Powell & Oakes, based upon a federal question was not "frivolous", or if the agency allegations would support diversity of citizenship jurisdiction, did the District Court properly conclude, based solely upon the allegations in the Complaint, that Cohen's claim against Anchor Hocking was barred by the applicable Indiana statute of limitations?

(4) Regardless of the outcome of any of the foregoing issues, has Cohen presented any basis for this Court to grant the Petition For Writ of Certiorari, when in fact Cohen has done nothing more than "parrot" some provisions of the Supreme Court Rule 19, without making any attempt to argue a basis for this Court to grant the Petition?

III.
STATEMENT OF CASE

Cohen commenced this action on April 21, 1972, by a Complaint against all respondents in the United States District Court for the Southern District of Indiana, Indianapolis Division [which Complaint is set forth

in the brief of Powell & Oakes. Cohen alleged jurisdiction as to Powell & Oakes and Grant, based on a federal question [rhetorical paragraphs 2 and 3], and as to Anchor Hocking, based upon diversity of citizenship, affirmatively alleging that Powell & Oakes was a corporation incorporated under the laws of the State of Indiana [rhetorical paragraph 2], and that he [Cohen] was a citizen of the State of Indiana [rhetorical paragraphs 1 and 6.]

Anchor Hocking filed a motion to dismiss asserting lack of jurisdiction and that Cohen failed to state a claim upon which relief could be granted due to the statute of limitations. Cohen submitted a 37-page affidavit on August 31, 1973 in opposition to the Motions to Dismiss.

After the pretrial conference, on October 26, 1973 Anchor Hocking filed a motion for leave to file evidence in support of its motion to dismiss asserting that:

> "This evidence is relevant to the issue of whether plaintiff's Complaint states a claim upon which relief can be granted and will clarify the matters presented in the Affidavit of plaintiff filed in this cause on or about August 31, 1973."

On October 29, 1973, the District Court granted Anchor Hocking leave:

> ". . . to file evidence in support of its Motion to Dismiss within seven (7) days of the date of this Order Entry, and plaintiff Morris I. Cohen is hereby ordered to file any and all evidence in opposition within fifteen (15) days of the date on which defendant Anchor Hocking Glass Corporation files its evidence."

On November 5, 1973, Anchor Hocking Glass Corporation submitted evidence in support of its Motion to Dismiss.

On November 15, 1973, the District Court granted the Motion for Summary Judgment of Anchor Hocking [as it should have been labeled since it was a motion to dismiss supported by evidence outside the record], as well as sustained the Motion to Dismiss of Powell & Oakes and the Motion to Dismiss supported by evidence outside the record of Grant, and dismissed the action as to all defendants.

The opinion of the District Court demonstrates that it did so, based upon the affirmative allegations in Cohen's Complaint that the defamation of Cohen occurred in the taking of his deposition in another cause on February 5, 1969, that the applicable statute of limitations was two years, that the action filed by Cohen on April 21, 1972, was barred by such statute of limitations, and that Cohen had no standing due to the lack of any damages as to the asserted improper transcription of the deposition, the alleged failure to file the same with the Court, and the alleged violations of statutes by the reporter in this regard.

The United States Court of Appeals of the Seventh Circuit affirmed without reaching the question of the applicable statute of limitations, on the basis that the District Court lacked jurisdiction over the subject matter since the asserted federal question as to Powell & Oakes and Grant was "frivolous", and Cohen and Powell & Oakes were citizens of the State of Indiana so that diversity of citizen jurisdiction did not exist.

Both the District Court and the Seventh Circuit found Cohen's attempted claims against Powell & Oakes and Grant based on a federal question, to lack any merit as a matter of law. The difference between the two opinions is merely a difference of degree, that is—the Seventh Circuit found the claims to be "frivolous" so as not to support jurisdiction, and the District Court found the claims based on a federal question against Powell & Oakes and Grant, of "sufficient color" to support jurisdiction, but as a matter of law without merit, and that the claims for defamation against all respondents [through ancillary jurisdiction as to Powell & Oakes and Grant] were barred by the statute of limitations.

IV.

ARGUMENT

Due to absence of diversity of citizenship jurisdiction as to Anchor Hocking being based upon the absence of federal question jurisdiction as to Powell & Oakes, this question will first be discussed; then the absence of diversity of citizenship jurisdiction based on the result of the initial issue will be demonstrated; and finally, to the extent that jurisdiction existed, it will be demonstrated that any claim for relief as to Anchor Hocking was barred by the applicable statute of limitations.

No Federal Question as Against Powell & Oakes

Powell & Oakes has adequately briefed that if Cohen's attempted claims for relief based on a federal question are "frivolous" as the Seventh Circuit Court of Appeals found, then there is no federal question jurisdiction. For the sake of brevity that part of Powell & Oakes' Brief is hereby incorporated by reference.

The attempted claims for relief as set forth in Cohen's Complaint are summarized as follows:

> In rhetorical paragraph 7 Cohen alleged that the deposition taken of him as a deponent in another action was defamatory "by imputing that

he was lying under oath and thereby guilty of perjury."

In rhetorical paragraph 8 after setting forth that the deposition was not submitted to him for examination and signature or filed with the Court, Cohen alleged that such failures "constituted continuing civil contempt" pursuant to FRCP 45.

In rhetorical paragraph 9 Cohen alleged that the failure to submit the deposition to Cohen for examination and signature constituted a "misfeasance of office".

In rhetorical paragraph 10 Cohen alleged that it was "defamatory for the deposition to be published as it was without ever submitting it to plaintiff".

In rhetorical paragraph 11 plaintiff alleged that the publishing of the deposition in some manner constituted a "false attestation", by the reporter.

In rhetorical paragraph 12 Cohen alleged that he was deprived of due process of law by not being allowed to make changes or to read the deposition.

In rhetorical paragraph 13 Cohen alleged that there had been a concealment by the deposition not having submitted to him.

In rhetorical paragraph 16 Cohen requested a mandate from the District Court requiring that Powell & Oakes submit a true and correct copy of the transcript of the deposition to the District Court.

Finally, in rhetorical paragraph 17, plaintiff alleged that by reason of the facts previously set forth, "plaintiff's reputation and good name as an attorney has been damaged in the amount of $125,000" and he also requested exemplary damages.

It is readily apparent that Cohen did not allege any damage to have resulted from anything other than the

defamation. Cohen alleged no damage resulting from the failure to submit the deposition to him for examination and signature, from the depositions not being filed with the District Court, or from the alleged deprivation of due process of law by any of the aforegoing. Furthermore, it was affirmatively alleged that Cohen was not a party to the action in which his deposition was taken.

Without Cohen having been a party to the proceedings in which the deposition was taken, or without Cohen having suffered any damages merely from the taking of the deposition, or from the failure to submit such deposition to him it is difficult to perceive any basis for a claim for relief based upon such failures. As to Cohen's asserted rights to correct irregularities in the handling or filing of the deposition, Cohen was not a party to the action in which the deposition was taken; and therefore, Cohen had no interest in the same and did not demonstrate that any of his legally protected rights had been affected. Hence, Cohen had no standing.

As to Cohen's claim for relief for a writ of mandamus from the District Court, such has been abolished in the District Court FRCP 81(b). Furthermore, as noted by the Seventh Circuit Court of Appeals, a mandamus remedy,

> "is an ancillary remedy to be utilized only in the exercise of jurisdiction already acquired and is not an independent basis of jurisdiction. *Craig* v. *California*, 376 F.2d 583 (7th Cir. 1967)."

As to the failure to submit the deposition for filing the alleged civil contempt, the misfeasance of office, the deprivation of due process, and not being allowed to read and make appropriate changes before the

deposition was published, Cohen failed to allege any damage. The alleged damage came from the alleged defamation which took place during the deposition and the alleged defamation had no relationship to the failure to file the deposition with the Court, or the failure to give the deposition to Cohen for his examination and signature.

Cohen has not alleged any damage or a sufficient interest to complain of procedural irregularities as to the handling of his deposition after it was typed by the reporter, without regard to the questions of due process of law. Regardless of due process, if Cohen suffered no damage and had no legally protected rights, no claim for relief was stated as a matter of law. Cohen provided no legal authority to the District Court, to the Court of Appeals, or to this Court to support that the stated facts supported a claim for relief based on a federal question. The attempted claims for relief are so blatantly erroneous, they must be termed "frivolous" as was done by the Seventh Circuit Court of Appeals.

Absence of Diversity of Citizenship Jurisdiction

It has previously been demonstrated that Cohen's claim as to federal question jurisdiction for Powell & Oakes, was correctly termed "frivolous" by the Seventh Circuit Court of Appeals. To have been successful thereafter, Cohen had to demonstrate diversity of citizenship jurisdiction over Anchor Hocking and Powell & Oakes. However, Cohen affirmatively alleged in rhetorical paragraph 1 of his Complaint that "plaintiff is a citizen of the State of Indiana", and further, in rhetorical paragraph 2, "Powell & Oakes is a corporation incorporated under the laws of the State of Indiana".

For the purposes of diversity of citizenship, 28 USC 1332(c) makes a corporation a citizen of the State of its incorporation. It is "hornbook law" as well as being axiomatic that complete diversity between all the plaintiffs and all the defendants is required to sustain diversity of citizenship jurisdiction under 28 USC 1332(a). *Strawbridge* v. *Curtiss* (1806), 7 U.S. (3 Cranch) 267.

Since Cohen and Powell & Oakes were citizens of the State of Indiana, there was no diversity of citizenship jurisdiction as to Anchor Hocking.

Cohen attempts an argument [for the first time before the Seventh Circuit Court of Appeals] that diversity of citizenship jurisdiction existed due to Powell & Oakes being an agent of Anchor Hocking. The Seventh Circuit Court of Appeals relegated such assertions of Cohen to a footnote:

> "We find no merit in the agency contention. Lack of diversity, in our opinion, cannot be obviated by the fact of agency for a diverse party."

This contention of Cohen is equally as "frivolous" as the attempted claims for relief based on federal questions.

Statute of Limitations Barred Cohen's Claim Against Anchor Hocking

Cohen claims certain irregularities in the procedure by which the District Court sustained Anchor Hocking's "motion for summary judgment" [which was, in fact, a motion to dismiss supported by evidence outside of the record]. As previously demonstrated, Anchor Hocking was granted leave to file evidence in support

of the Motion to Dismiss by an order of District Court on October 29, 1973 and Cohen was granted leave to file evidence in opposition within 15 days after the date of filing of evidence by Anchor Hocking Glass Corporation, which time would have expired on November 20, 1973. However, on November 15, 1973 the District Court sustained the several motions of the defendants.

Cohen had previously filed a 37 page affidavit in opposition to all the motions to dismiss by each respondent. Pursuant to Rule No. 9 of the United States District Court, for the Southern District of Indiana, Indianapolis Division, hearings are not held on motions for summary judgment and time limits are set for the filing of evidence.

Whatever may have been the propriety with respect to the entry of summary judgment for Anchor Hocking on November 15, 1973, as opposed to after November 20, 1973, Cohen was not prejudiced by such action of the District Court, since the District Court's decision was based solely upon the allegations of Cohen's Complaint. Furthermore, the evidence submitted by Anchor Hocking went solely to the issue of absolute privilege under the law of defamation and according to Cohen all evidentiary matters filed by Anchor Hocking were already of record [see Plaintiff's Exceptions To Court's Order, ¶ 1, filed November 23, 1973].

Cohen alleged in his Complaint that the defamatory matter was published at the taking of his deposition "specifically from 10:00 A.M. to 1:00 P.M. on February 5, 1969" [rhetorical paragraph 6, Plaintiff's Complaint, Rec. 6-11]. On April 21, 1972, Cohen filed the Complaint in this action.

The applicable statute of limitations is Ind. Stat. Ann. 34-1-2-2 [§ 2-602] which provides as follows:

> "The following actions shall be commenced within the periods hereinafter prescribed after the cause of action has accrued, and not afterwards.
>
> "First. For injuries to person or character . . . within two (2) years . . . ."

The inclusion of actions for injuries to the "person or character" makes it irrefutably clear that this is the statute of limitations under Indiana law which is applicable to actions for defamation of character. "The basis of the action for libel is damages for injury to the character . . ." *Hamilton* v. *Lowery* (1903), 33 Ind. App. 184, 189, 71 N.E. 54. Cohen's action accrued at the time of the alleged injury to his character. *Merit* v. *Economy Dept. Store* (1955), 125 Ind.App. 560, 128 N.E.2d 279. Consequently, Cohen's claim, which was filed more than three years after the injury and the accrual of his action, was barred by the two year statute of limitation.

The District Court based its ruling solely on the Complaint and not on any evidence outside the record. Consequently, Cohen's assertions as to procedural irregularities in the granting of Anchor Hocking's Motion For Summary Judgment [Motion to Dismiss supported by evidence outside the record], are unavailing as no prejudice resulted.

Cohen asserts that the statute of limitations did not begin to run due to concealment. In order for concealment of a cause of action to toll a statute of limitations, there must be some fraud upon the plaintiff by the defendants. For instance in *Guy* v. *Schmidt, et al.*

(1956), 236 Ind. 101, 138 N.E.2d 891, it was held as follows:

> "A cause of action normally accrues when the injurious action occurs although the plaintiff may not learn of the injurious act until later. However, if there is a concealment which prevents the plaintiff from learning of the cause of action, the statute is tolled during such concealment. *Hotelling* v. *Walther* (1942), 169 Ore. 559, 130 P.2d 944, 144 A.L.R. 205 and Annotations; *Schmit* v. *Esser* (1931) 183 Minn. 354, 236 N.W. 622; 74 A.L.R. 1312 and Annotations; *Schmucking* v. *Mayo, supra,* 183 Minn. 37, 235 N.W. 633.
>
> "Usually, there must be some active effort on the part of one to be guilty of concealment, but where a fiduciary or confidential relationship exists, such as physician-patient, there exists between the parties and a failure to do so results in concealment."
>
> [236 Ind. at 108-109.]

Not only was there no factual basis for concealment alleged in the Complaint, but on the face of the Complaint, it was alleged that the defamation took place during the deposition of Cohen. It was impossible for concealment to apply to the case at bar since Cohen was present during the alleged defamation. Hence, concealment and its relationship to the statute of limitations has no applicability to the case at bar.

Reasons for Dismissing Petition for Writ or Denying Writ as to Anchor Hocking

Supreme Court Rule 21(c) requires that petitioner when filing his petition, file a proof of service under Rule 33 and that the petitioner notify all respondents

of the date of filing and the docket number of the case. On October 16, 1975, the undersigned counsel for petitioner received the petition without a docket number and without any notification of the date of filing.

Rule 23-1(b) requires that a petitioner set forth reasons for this Court to grant a writ of certiorari as suggested in Rule 19, and make a direct and concise argument as to such reasons. Cohen in the Petition merely "parrots" several of the reasons as set forth in Rule 19, without making any attempt to apply and argue these reasons in the case at bar. No case was cited by Cohen in his Petition demonstrating that the decision of the United States Court of Appeals for the seventh Circuit Court conflicted with that of another court of appeals on the same matter. Cohen does not attempt to state what important question is involved, be it state or territorial, or that the Court of Appeals decided such question contrary to applicable state or territorial law. Cohen further does not attempt to discuss or demonstrate any important question of federal law decided in this case which has not been and should be settled by this Court. Indeed, Cohen's assertions of a federal question have been found "frivolous" by one count.

There has been no departure from any accepted or usual course of judicial procedure which has resulted in any prejudice to Cohen inasmuch as the ruling of the District Court and the ruling of the Court of Appeals were based solely on the Complaint and not upon any evidence outside the record.

Due to Cohen's failure to comply with Supreme Court Rules 19, 23-1(h), and (4), this Court should dismiss or deny Cohen's Petition for Writ of Certiorari.

V.

CONCLUSION

There was no federal question jurisdiction between Cohen and Powell & Oakes. Therefore, there was no diversity of citizenship jurisdiction as to Anchor Hocking. Regardless of whether there was jurisdiction, Cohen's Complaint demonstrates on its face that any claim is barred by the applicable two year statute of limitation.

Anchor Hocking respectfully requests that Cohen's Petition for Writ of Certiorari be dismissed or denied.

Respectfully submitted,

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